



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
Wal-Mart Stores, Inc. ) **MURs 6051 and 6052**

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND  
COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. MCGAHN II**

In these matters, we voted to approve the Office of the General Counsel's recommendations to find no reason to believe that Wal-Mart Stores, Inc. ("Respondent") violated 2 U.S.C. § 441b(a) or 11 C.F.R. § 114.2(b) in connection with allegations that Respondent made corporate expenditures.<sup>1</sup> Complainants in these matters alleged, based on a *Wall Street Journal* article, that in the course of store manager and department supervisor meetings, Respondent's corporate resources were used for express advocacy communications to personnel outside of the company's restricted class, in violation of 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b). We agreed with the Office of the General Counsel's recommendations and note that under their reasoning, as explained in the attached Factual and Legal Analysis, there was no reason to believe that Respondent's activities violated any provision of the Act or the Commission regulations. Therefore, we voted to approve the General Counsel's recommendations and, for the purposes of 2 U.S.C. § 437g(a)(8), attach the Office of the General Counsel's Factual and Legal Analysis in this matter.<sup>2</sup>

Date: April 30, 2009

Matthew S. Petersen  
Vice Chairman

Caroline C. Hunter  
Commissioner

Donald F. McGahn II  
Commissioner

<sup>1</sup> Vice Chairman Petersen and Commissioners Hunter and McGahn voted affirmatively while Chairman Walther and Commissioners Bauerly and Weintraub dissented. The Commission, after a vote to find reason to believe Respondent violated 2 U.S.C. § 441b(a) and 11 C.F.R. § 114.2(b) failed 3-3, subsequently voted to close the file.

<sup>2</sup> See Attachment 1.

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**ATTACHMENT 1**

**FEDERAL ELECTION COMMISSION****FACTUAL AND LEGAL ANALYSIS****RESPONDENT: Wal-Mart Stores, Inc.****MURs: 6051/6052****I. INTRODUCTION**

This matter was generated by complaints filed with the Federal Election Commission ("Commission") by American Rights at Work, the American Federation of Labor and Congress of Industrial Organizations, Change to Win, WakeUpWalMart.com (MUR 6051) and Wal-Mart Watch (MUR 6052). See 2 U.S.C. § 437g(a)(1). For the reasons set forth below, the Commission finds no reason to believe that Wal-Mart Stores, Inc. ("Wal-Mart") violated 2 U.S.C. § 441b(a) or 11 C.F.R. § 114.2(b).

**II. DISCUSSION****A. Facts**

Wal-Mart is incorporated in Delaware and headquartered in Arkansas. On August 1, 2008, the *WSJ* published an article reporting that Wal-Mart "is mobilizing its store managers and department supervisors around the country to warn that if Democrats win power in November, they'll likely change federal law to make it easier for workers to unionize companies—including Wal-Mart." Ann Zimmerman and Kris Maher, *Wal-Mart Warns of Democratic Win*, *WSJ*, August 1, 2008. The story reports that the department supervisors are hourly workers to whom the company may not advocate for specific federal candidates. *Id.* The article states that then-Senator Obama co-sponsored EFCA, and states he "has said several times he would sign it into law if elected president." *Id.* According to unnamed Wal-Mart employees who attended the meetings in Maryland, Missouri, and other states, "[t]he Wal-Mart human-resources managers who run the meetings don't specifically tell attendees how to vote in November's election, but

1 make it clear that voting for Democratic presidential hopeful Sen. Barack Obama would be  
2 tantamount to inviting unions in." *Id.* One Wal-Mart customer-service supervisor reportedly  
3 told the *WSJ* "[t]he meeting leader said, 'I am not telling you how to vote, but if the Democrats  
4 win, this bill will pass and you won't have a vote on whether you want a union'.... I'm not a  
5 stupid person. They were telling me how to vote." *Id.* On the basis of the information reported  
6 in the *WSJ* article, the complainants allege that Wal-Mart was explicitly advocating for the defeat  
7 of Democratic candidates to hourly workers who are outside of its restricted class, in violation of  
8 2 U.S.C. § 441b(a).<sup>1</sup>

9 Wal-Mart filed nearly identical responses to each complaint stating the purpose of the  
10 meetings at issue was "to educate and train its managers [and supervisors] about the potential  
11 impact of pending federal legislation" and the appropriate ways to communicate with [non-  
12 managerial employees] about EFCA questions," rather than to advocate for the election or defeat  
13 of a candidate. Responses, at 1 and 6. With its responses, Wal-Mart included a document  
14 entitled "Labor Relations Employee Free Choice Act Training for Supervisors/ Labor Relations  
15 Facilitator's Guide" dated April 2008 (the "Guide"), which Wal-Mart states contains the  
16 directions, script, and copies of the slides used in the presentations to managers and supervisors.  
17 The Guide specifically states "this class is intended for an audience of hourly supervisors."  
18 Guide Overview. It further states that "Supervisors are . . . hourly associates," including those  
19 with the titles "Supervisor," "Team Lead," and "Department Managers." *Id.* According to the

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<sup>1</sup> A second *WSJ* article was published the day the MUR 6051 complaint was filed reporting the complaint had been filed with the Commission; it included some of the same information as in the previous *WSJ* article, a discussion of possible labor law violations, and comments by a Wal-Mart executive (echoing some of those in the responses) and election and labor law attorneys. Kris Maher and Ann Zimmerman, *Unions Seek Probe of Wal-Mart Over Election Law*, *WSJ*, August 14, 2008.

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1 Guide, attendees were required to verify their attendance by computer and complete a "Labor  
2 Relations Computer Based Learning module." *Id.* The Guide's directions state that all training  
3 had to be completed by July 31, 2008.

4 The Guide reviews the EFCA and the differences with the current law, what might  
5 happen should it pass, and ways that managers should communicate with employees should  
6 EFCA questions arise. According to the responses and the Guide, there were a total of 48  
7 PowerPoint slides with accompanying scripts; only one slide and the script for another slide  
8 referenced federal elections. Guide, at 36, 38.

9 One of these slides, with instructions that it be read to the class, states:

10 The EFCA Almost Passed in 2007.

11  
12 U.S. House of Representatives passed the bill 241 to 185 (about 25  
13 Republicans voted for the bill).

14  
15 Senate vote would have been 52 to 48; needed 60 votes to break  
16 filibuster, and President Bush threatened veto.

17  
18 If Democrats win enough Senate seats and we elect a Democratic  
19 President in 2008, this will be the first bill presented.

20  
21 Guide, at 36 (emphasis in original).

22  
23 Two slides later, the presenter is told to read:

24  
25 You saw a moment ago how close this bill came to passing in 2007.  
26 Now, we are in a year where many new leaders will be elected.

27  
28 As a part of our culture at Wal-Mart, we have thought for years that  
29 what happens in the political world needed to stay there; as long as we  
30 were focused on our customers and Associates, everything else would  
31 take care of itself. Today, we realize that simply isn't the case.

32  
33 We do have a point of view on legislation like this that is potentially  
34 harmful to our business and we feel we have a duty to educate you on  
35 this issue as well because, as Shareholders in this company, through

1           401K and Profit Sharing, we all have an interest in these issues that  
2           could have a negative effect on our company.

3  
4           We are not trying to tell you or anyone else how to vote or who a person  
5           can support. Republican, Democrat, or Independent; That is your own  
6           personal choice.

7  
8           However, we do want to encourage you to be informed on how  
9           congressional and presidential decisions could impact our personal lives  
10          and the company we work for.

11  
12         Guide, at 38.

13                 In order to support its position that the presentation was intended as education and  
14         training, Wal-Mart points to other slides describing EFCA, its purported impact and downsides  
15         for the company and its employees, as well as those setting forth rules and other advice  
16         governing how managers could communicate with non-manager employees about EFCA. Wal-  
17         Mart also references (but does not provide) a company-wide policy prohibiting political activities  
18         during work-time, and attaches a memorandum addressed to "Walmart Stores Management  
19         Team" from Bill Simon, Chief Operating Officer, dated August 1, 2008, the same day the *WSJ*  
20         article was published (the "Memo"). The Memo states that the *WSJ* article "quotes several  
21         Walmart associates who felt the training encouraged them to vote against democratic candidates,  
22         especially Senator Obama because of his strong support for labor unions." The Memo then  
23         asserts "[t]he training has concluded, but let me be absolutely clear. If anyone representing our  
24         company gave the impression we were telling associates how to vote, they were wrong and acting  
25         without approval. . . . [P]lease ensure that your associates understand our position." The Memo  
26         continues:

27                 We believe that the card check bill is bad for business and have been on  
28                 record as opposing it for some time. We feel that educating you, our  
29                 associates, about the bill is the right thing to do. However, we are a  
30                 bipartisan company and our associates reflect the wide range of attitudes

1 and political diversity of this country. We work with both Republican and  
2 Democratic leaders and our political contributions reflect that as well - this  
3 year we gave roughly half of our Political Action Committee dollars to  
4 each party.

5  
6 Remember that as managers you represent the company. No matter what  
7 your personal political preferences might be, as a company we will not  
8 take sides.

9  
10 **B. Analysis**

11 **1. Express Advocacy**

12 The Act prohibits corporations from making contributions or expenditures in connection  
13 with a federal election. 2 U.S.C. § 441b(a). The Commission's regulations provide that a  
14 corporation is prohibited from making "expenditures with respect to a federal election . . . for  
15 communications to those outside the restricted class that expressly advocate the election or defeat  
16 of one or more clearly identified candidate(s) or candidates of a clearly identified political party."  
17 11 C.F.R. § 114.2(b)(2); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249  
18 (1986) ("*MCFL*").

19 "Expressly advocating," or express advocacy, is defined in 11 C.F.R. § 100.22. Express  
20 advocacy may consist of phrases, slogans or individual words "which in context can have no  
21 other reasonable meaning than to urge the election or defeat of one or more clearly identified  
22 candidates." 11 C.F.R. § 100.22(a); *see also* *MCFL*, 479 U.S. at 249 ("[The publication]  
23 provides in effect an explicit directive: vote for these (named) candidates. The fact that this  
24 message is marginally less direct than "Vote for Smith" does not change its essential nature.")).  
25 Express advocacy may also consist of a communication that "taken as a whole and with limited  
26 reference to external events, . . . , could only be interpreted by a reasonable person" as advocating  
27 the election or defeat of a federal candidate because it has an electoral portion which is

1 "unmistakable, unambiguous, and suggestive of only one meaning" and "reasonable minds could  
2 not differ as to whether it encourages actions to elect or defeat one or more clearly identified  
3 candidate(s) . . . ." 11 C.F.R. § 100.22(b).

4 There is no information that Wal-Mart, through its presentation or otherwise, used  
5 phrases, slogans or individual words, which in context had no other reasonable meaning than to  
6 urge the election or defeat of one or more clearly identified candidates or candidates of a clearly  
7 identified political party. 11 C.F.R. §§ 100.22(a); 114.2(b)(2). The complaint in MUR 6051  
8 contends, however, that Wal-Mart's presentation "informing employees that it is imperative that  
9 [EFCA] not be enacted and, simultaneously, that their voting for Senator Obama and other  
10 Democrats would lead to its enactment" is express advocacy within the meaning of *MCFL* and  
11 section 100.22(a)'s example of "'vote Pro-Life' or 'vote Pro-Choice' accompanied by a listing of  
12 clearly identified candidates described as Pro-Life or Pro-Choice." MUR 6051 complaint at 2.

13 In *MCFL*, a special edition newsletter urged readers to "VOTE PRO-LIFE," set forth the  
14 candidates' views on three issues, and then identified each candidate as either supporting or  
15 opposing what *MCFL* regarded as the correct position. 479 U.S. at 243. *MCFL* indicated this  
16 through three symbols: (1) a "y," which indicated that a candidate supported the *MCFL* view on a  
17 particular issue; (2) an "n," which indicated that a candidate opposed the *MCFL* view; and (3) an  
18 asterisk, which was placed next to the names of incumbents who had maintained "a 100% pro-  
19 life voting record in the state house by actively supporting *MCFL* legislation." *Id* at 243-44. The  
20 newsletter also included photographs of only those candidates who received a "y" on all three  
21 issues, or were identified either as having a 100% favorable voting record or as having stated a  
22 position consistent with that of *MCFL*. *Id* at 244. The Court reasoned that the newsletter could  
23 not "be regarded as a mere discussion of public issues that by their nature raise the names of



1 certain politicians." *Id.* at 249. Rather, the Court found that the newsletter provided "in effect an  
2 explicit directive" to vote for the candidates favored by *MCFL*, and stated that "[t]he fact that [a]  
3 message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id.*

4 In contrast, the Wal-Mart presentation, in which the company makes clear it believes that  
5 ECFA will be harmful to its business, does not, on balance, provide "in effect an explicit  
6 directive" to vote for federal candidates favored by Wal-Mart. The language in the Guide, which  
7 states as a matter of fact that if "Democrats win enough Senate seats and we elect a Democratic  
8 President in 2008" EFCA will pass, could be interpreted, and was interpreted by some, as a  
9 warning to vote against the Democratic presidential candidate, and, therefore, makes the Guide a  
10 close call. However, the Guide also explicitly says Wal-Mart is "not trying to tell you or anyone  
11 else how to vote or who a person can support," but wants "to encourage you to be informed on  
12 how congressional and presidential decisions could impact our personal lives and the company  
13 we work for." Guide at 38. The rest of the presentation describes EFCA, sets forth Wal-Mart's  
14 view of the possible impact that the legislation and unions would have on its business, and  
15 advises how to communicate appropriately with Wal-Mart employees regarding their questions  
16 or concerns about EFCA so as to avoid an Unfair Labor Charge.<sup>2</sup> See Guide at 15. Therefore,  
17 the Guide may be viewed, in context, as having more than one reasonable meaning, including as  
18 an educational and training program, in contrast to *MCFL*'s special edition newsletter urging

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<sup>2</sup> It is not within the Commission's jurisdiction to determine whether the Guide comports with the federal labor laws.

1 readers to "Vote Pro-Life," accompanied by a list of clearly identified candidates who supported  
2 that position.<sup>3</sup> Thus, the Guide does not contain express advocacy under section 100.22(a).

3 Nor does the Guide contain express advocacy under section 100.22(b), which  
4 encompasses a communication that, when taken as a whole or with limited reference to external  
5 events, "could only be interpreted by a reasonable person as containing advocacy of the election  
6 or defeat of one or more clearly identified candidate(s) because" it contains an "electoral portion"  
7 that is "unmistakable, unambiguous, and suggestive of only one meaning" and "reasonable minds  
8 could not differ as to whether it encourages actions to elect or defeat one or more clearly  
9 identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b). The  
10 Guide's electoral portion, including "[i]f Democrats win enough Senate seats and we elect a  
11 Democratic President in 2008, this will be the first bill presented," Guide at 36, and "[n]ow, we  
12 are in a year where many new leaders will be elected," Guide at 38 is not "clear, unmistakable,  
13 unambiguous and suggestive of only one meaning," and "reasonable minds could" differ "as to  
14 whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or  
15 encourages some other kind of action." 11 C.F.R. § 100.22(b)(1).

16 According to the *WSJ* article, some employees reportedly stated "[t]he Wal-Mart human-  
17 resources managers who run the meetings don't specifically tell attendees how to vote in  
18 November's election, but make it clear that voting for Democratic presidential hopeful Sen.

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<sup>3</sup> Although the Guide referenced "one or more clearly identified candidate(s)," it did not urge anyone to vote for a particular issue and then identify or depict candidates supporting that issue. Between the Guide's April 2008 date and the conclusion of the training by July 31, 2008, both then-Senator Hillary Clinton and then-Senator Barack Obama were viable Democratic primary candidates. Thus, the reference to "if we elect a Democratic President in 2008" in the Guide can be read to include then-Senators Clinton and Obama as "one or more clearly identified candidates." Another reference to "one or more clearly identified candidates" is found on page 36 of the Guide, which states in part, "if Democrats win enough Senate seats . . . in 2008 . . .;" to the extent that Democratic Senate candidates had secured their party's nominations between April and July 2008, that reference would include those candidates. See 11 C.F.R. §§ 100.17; 100.22(b); Express Advocacy Final Rule, 60 Fed. Reg. at 35293-4.

1 Barack Obama would be tantamount to inviting unions in," and one Wal-Mart supervisor  
2 reportedly stated "[t]he meeting leader said, 'I am not telling you how to vote, but if the  
3 Democrats win, this bill will pass and you won't have a vote on whether you want a union' ....  
4 I'm not a stupid person. They were telling me how to vote." *Id.* Wal-Mart's statements that  
5 "[w]e are not trying to tell you or anyone else how to vote or who a person can support" and that  
6 it "is your own personal choice," Guide at 38, are not dispositive. *See MCFL*, 479 U.S. at 249  
7 ("The disclaimer of endorsement cannot negate th[e] fact" that the newsletter provides an explicit  
8 directive to vote for candidates). However, on balance, the presentation, when taken as a whole,  
9 could reasonably be construed as two-fold: (1) educating Wal-Mart supervisors and managers  
10 why Wal-Mart believes that unions could hurt its business, and (2) educating Wal-Mart  
11 supervisors and managers on how to communicate, in a way consistent with Wal-Mart's views,  
12 with non-managerial employees about the EFCA, the passage of which seemed likely should  
13 Democrats gain control of the White House and the Senate.

14 Thus, the Guide, taken as a whole, cannot only be interpreted by a reasonable person as  
15 containing advocacy of the election or defeat of one or more clearly identified candidates, and  
16 accordingly does not constitute express advocacy under section 100.22(b). Therefore, Wal-Mart,  
17 through its presentation, did not make a prohibited corporate expenditure. Because of this  
18 conclusion, we did not address Wal-Mart's contention that even if the presentation contained  
19 express advocacy, the hourly supervisors and managers who attended were not outside its  
20  
21

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1 restricted class.<sup>4</sup>

## 2 2. Unauthorized Statements and Remedial Measures

3 In its responses, Wal-Mart acknowledges the possibility that some presenters may have  
4 made comments during presentations, citing to reported statements in the *WSJ* articles, see  
5 Responses at 8 and note 9, that went beyond the scripted presentation materials.<sup>5</sup> Wal-Mart  
6 contends that these statements, if they occurred, did not constitute express advocacy, but even if  
7 they did, Wal-Mart should not be sanctioned for unauthorized, isolated statements, citing MUR  
8 5919 (Harrah's Entertainment). The Statement of Reasons of Chairman Robert D. Lenhard, Vice  
9 Chairman David M. Mason and Commissioners Hans A. von Spakovsky and Steven T. Walther  
10 in MUR 5919 states that the Commission voted to dismiss the complaint without admonishment  
11 as to the corporation because, in part, it had taken steps to prevent violations of the Act and  
12 responded swiftly to remedy the situation and report it to the Commission when it discovered an  
13 independent contractor had sent out an email containing express advocacy in violation of  
14 company policy and the Act.

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<sup>4</sup> Members of a corporation's restricted class, which includes stockholders, salaried managers and some salaried supervisors, are allowed to receive communications containing express advocacy. 2 U.S.C. § 441b(b)(2)(A); 11 C.F.R. §§ 114.1(a)(2)(i); 114.2(b)(2)(ii). Wal-Mart claims that the hourly supervisors are functionally managers under National Labor Relations Act rules and that there are no sound policy rules to treat them as outside of the restricted class. However, the explicit language of 2 U.S.C. § 441b and Commission regulations excludes hourly supervisors, hourly employees and "salaried lower level supervisors having direct supervision over hourly employees" from the restricted class. 2 U.S.C. § 441b(b)(7); 11 C.F.R. §§ 114.1(c), (j).

<sup>5</sup> According to a press release on the Wal-Mart Watch website dated August 1, 2008, "[s]ome of the reports we received were even more egregious than what was described in [the *WSJ* article]. In one case, a worker said the presenter showed a slide that said 'Obama = union' and then the audience was told 'why unions were bad.'" However, none of this information was mentioned in the MUR 6052 complaint by Walmart-Watch, filed on August 18, 2008. In addition, an editorial in the *New York Times* on August 17, 2008, stated "[p]roviding workers with a list of members of Congress who, in Wal-Mart's view, support bad legislation that would worsen workers lives seems indistinguishable from telling them who to vote against." At 1. Again, there was no mention of any list of members of Congress in either complaint, and there is no other publicly available information concerning the existence of any such list.

1           Similar to Harrah's Entertainment, Wal-Mart states it also has a policy prohibiting  
2   political activity during working hours that applied to the presenters. In addition, the Wal-Mart  
3   presentation contained explicit instructions as to what was to be read to audiences, including a  
4   statement that Wal-Mart was not trying to tell anyone how to vote or whom to support. The  
5   initial *WSJ* article quotes a company spokesperson as saying "If anyone representing Wal-Mart  
6   gave the impression we were telling associates how to vote, they were wrong and acting without  
7   approval." Moreover, on the same day that the initial *WSJ* article was published, Wal-Mart's  
8   Chief Operating Officer sent an email to Wal-Mart managers reiterating the spokesperson's  
9   message and asking managers to "please ensure that your associates understand our position."

10           While MUR 5919 is distinguishable from the current matter, it is instructive. Harrah's  
11   Entertainment self-reported what it thought was a violation involving emails that an independent  
12   contractor sent without approval. In contrast, Wal-Mart did not self-report and maintains that  
13   there has been no violation in connection with authorized presenters who may have deviated  
14   from scripts used in the presentation at issue and invokes MUR 5919 only if the Commission  
15   disagrees. Nevertheless, MUR 5919 is instructive because of the actions taken by Wal-Mart to  
16   avoid violations of the Act and to remedy possible statements which, if they occurred, were  
17   unauthorized. We believe that under all the circumstances here, Wal-Mart has made at least  
18   some effort to avoid FECA violations in the first instance by instructing in the Guide that  
19   presenters read a statement explicitly stating that Wal-Mart was not telling anyone how to vote or  
20   whom to support, and then acted quickly to reiterate its position once it became aware, through  
21   the *WSJ* article, that some presenters may have deviated from the explicit guidance in the Guide.  
22   Moreover, in its Responses, Wal-Mart has stated that it has "redoubled its efforts to assure that

1 none of its future training sessions will make any references that even remotely could be  
2 perceived as political advocacy." Responses at 12.

3 Therefore, there is no reason to believe that Wal-Mart violated 2 U.S.C. § 441b(a) or  
4 11 C.F.R. § 114.2(b).